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No. 91-76

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LOUISVILLE EDIBLE OIL PRODUCTS, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONERS

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The petition demonstrated that the decision below presents a substantial question under the Double Jeopardy Clause of whether a significant penalty for Clean Air Act violations imposed by a local government acting pursuant to delegated federal authority bars a later federal prosecution for the same alleged violations. Petitioners made clear that such a federal prosecution falls squarely within the exception to the dual sovereignty doctrine announced in *Bartkus* v. *Illinois*, 359 U.S. 121

(1959). Moreover, the issue presented here is the precise issue left open in *United States* v. *Wheeler*, 435 U.S. 313 (1978), an issue this Court characterized as an "interesting question."

In its opposition, the United States engages in a simplistic analysis of the complex question raised by the decision below and concludes that because different sovereigns are involved, the later federal prosecution is permissible. But the United States fails to show that the court of appeals' opinion can be reconciled with either the reasoning of the Court under *Bartkus* or the related logic of *Wheeler*. Rather, the United States belittles the *Bartkus* exception and, although the issues involved in *Wheeler* were squarely ruled upon by the court below, attempts to hide behind a claim that petitioners have "waived" any argument based on *Wheeler* because it was not cited below. Further, the United States shrugs off the serious practical problems raised by the petition by asserting that Congress "authorized" duplicative penalties by "different sovereigns" for the same Clean Air Act violations. None of these arguments raised in the opposition demonstrates either that the decision below can be squared with Double Jeopardy decisions of this Court or that this Court should not review the court of appeals' decision.

1. The United States glosses over the significance of the issue raised in the petition by asserting that "petitioners are subject to separate federal and local enforcement actions because their conduct 'transgresses the laws of two sovereigns.'" Br. in Opp. 7 (quoting *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985)). But this Court's Double Jeopardy jurisprudence and, in particular, its cases analyzing the dual sovereignty doctrine are not as wooden as the United States suggests.

Contrary to the suggestion of the United States (Br. in Opp. 7-8), this Court's inquiry under the Double Jeopardy Clause does not end once it is determined that two sovereigns are involved. It is simply not an answer under

the Double Jeopardy Clause to say "separate federal and local enforcement actions charge separate offenses that are separately punishable." Br. in Opp. 7. Although Kentucky and the United States are indisputably separate sovereigns (see Pet. 17), this Court's decisions in *Bartkus*, *Wheeler*, *Grafton* v. *United States*, 206 U.S. 333 (1907), and *Waller* v. *Florida*, 397 U.S. 387 (1970), make clear that the mere fact that two sovereigns are involved does not automatically clear the way for multiple prosecutions for the same offense.

Here, because Kentucky has adopted federal Clean Air Act standards as its own and the federal government has delegated enforcement authority to Kentucky under that Act, this Court's decisions require a more searching examination of each sovereign's authority than that undertaken by the court below and defended by the United States in its opposition. The United States recognizes, as it must, that "[s]ection 112(d) provides that '[i]f the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.'" Br. in Opp. 3 (*quoting* 42 U.S.C. § 7412(d)(1)). But the United States proceeds to ignore this statutory language and baldly asserts that "Congress and the EPA did not 'delegate' authority to Kentucky to promulgate local regulations." Br. in Opp. 9.[1] Absent Section 112(d) and the delegation of authority by the federal government to Kentucky, there would be *no state authority* to act under the Clean Air Act, and no authority for Kentucky to impose more than $174,000 in fines on petitioners for violations of that Act.[2] The later prosecution by the

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[1] The United States' contention that Section 112(d) merely provides "an incentive" for Kentucky and other states ignores both the plain language of the statute and its practical effect.

[2] Plainly, the federal-state enforcement scheme under the Clean Air Act implicates issues that were not before this Court in the case on which the United States principally relies. See *Heath* v.

United States for these same violations raises a serious and unresolved question under the Double Jeopardy Clause.

As petitioners previously demonstrated, because the State of Kentucky acted as an agent for the federal government under authority delegated to it pursuant to the Clean Air Act, the decision below is inconsistent with the *Bartkus* exception. See Pet. at 11-12. The United States relegates its discussion of *Bartkus* to a single footnote, where, notwithstanding this delegation of enforcement authority, it asserts that the Jefferson County Board was not acting as a "tool" for the federal authorities. Br. in Opp. 9 n.2. But if the *Bartkus* exception is to have any meaning at all, it must except from the dual sovereignty doctrine the explicit delegation of enforcement authority, even if the delegation is from one sovereign to another. See Pet. 13.[3]

2. The United States does not dispute that the decision below will undermine efforts to enforce air quality

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Alabama, 474 U.S. 82, 87-88 (1985) (successive prosecutions by Georgia and Alabama for murder do not violate Double Jeopardy Clause). This is not a situation where states have initiated prosecutions under criminal laws enacted pursuant to their police powers. Here, in contrast, Kentucky was implementing a scheme of federal regulation under authority delegated to it by the federal government.

[3] To suggest, as does the United States, that petitioners read *Bartkus* too broadly, because "[t]he courts of appeals have uniformly rejected far narrower interpretations" (Br. in Opp. 9 n.2) is disingenuous, at best. The cases cited by the United States stand for the proposition that close cooperation between federal and state authorities does not implicate the *Bartkus* exception. See, *e.g.*, *United States* v. *Bernhardt*, 831 F.2d 181, 182-83 (9th Cir. 1987); *United States* v. *Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984); *United States* v. *Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *United States* v. *Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). Here, in contrast, "[t]he 'dual sovereignty' doctrine is inapplicable [because] separate prosecuting entities exercise authority of the same sovereign." *Aboumoussallem*, 726 F.2d at 910 n.2.

standards promulgated pursuant to the Clean Air Act. Instead, the opposition asserts that "Congress has authorized dual federal and state enforcement and has, in effect, rejected petitioners' policy arguments." Br. in Opp. 11. Plainly, the decision below raises serious policy and enforcement problems under the Clean Air Act, particularly by discouraging settlements of enforcement disputes. Pet. 13-15. By granting a writ of certiorari, this Court can resolve the uncertainty regarding what all parties here acknowledge are significant enforcement problems.

3. Rather than address squarely petitioners' assertion that the decision below is inconsistent with *Wheeler*, the United States, in apparent recognition that multiple enforcement actions under the Clean Air Act cannot be reconciled with that decision, initially argues that petitioners have waived this argument because they did not "cite *Wheeler* in their briefs to the court of appeals." Br. in Opp. 11. In *Wheeler*, this Court interpreted both the Double Jeopardy Clause and the dual sovereignty doctrine, issues that were raised below, squarely addressed by the court of appeals, and, indeed, discussed extensively in the United States' opposition. To suggest that these issues have been waived is nonsense.

The *Wheeler* court made clear that "[w]hat differentiated [cases holding that the dual sovereignty doctrine is inapplicable] from *Bartkus* and *Abbate* [v. *United States*, 359 U.S. 187 (1959)] was not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." 435 U.S. at 320. Plainly, the ultimate source of the power exercised by Kentucky is the federal government, and the federal government has delegated that authority to Kentucky.

The United States asserts that the statutory scheme results in only a "partial preemption[]" of Kentucky's sovereign authority. Br. in Opp. 12. But this again ig-

nores the express delegation of authority from the federal government to the states under Section 112 of the Clean Air Act, as well as Kentucky's adoption of the federal standards. States *qua* states have no authority to implement and enforce standards under the Clean Air Act. They only have such authority "if the Administrator finds the State procedure is adequate, [then] he shall delegate to such State any authority he has under this chapter to implement and enforce such standards." Without the delegation of authority from the EPA, Kentucky has *no* authority to enforce Clean Air Act standards. Only *after* the delegation may Kentucky enforce those standards. This is precisely the question left open in *Wheeler*: whether there is an exception to the dual sovereignty doctrine when Congress deprives a sovereign of its authority to act, and then that sovereign regains such authority from Congress. That "interesting" issue carries with it significant enforcement implications that require review by this Court.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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